Supreme Court of the United States.

No. 86.

THE ROYAL INSURANCE COMPANY,
Plaintiff in Error,

vs.

RUPERTO MARTIN, as Executor of the Will of Francisco Martin, Deceased,
Defendant in Error.

BRIEF IN REPLY FOR PLAINTIFF IN ERROR.

First.

The suggestion that the reference to the Territories in the 35th Section of the Foraker Act may refer to the laws regulating appeals from the Territories of Alaska, Hawaii and Indian Territory, and not to the Territories generally in respect to which this subject is governed by the 15th Section of the Judiciary Act of 1891, has no merit.

The reference in the 35th Section could not well be held to apply to laws regulating the subject subsequently passed which were special in their character and related to particular territories, and this is true of Alaska and Hawaii. The reference is evidently to existing laws, and these

two laws were not then existing. As to the Indian Territory the law regulating appeals from its Supreme Court, if it was, as claimed, different from the regulation of appeals from other Territories, the law was special, applying to that Territory only. This statute would not answer to the description in the 35th Section of the Foraker Act that writs of error, &c., shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations, and in the same cases as from the Supreme Courts of the Territories of the United States. One Territory is not *the* Territories. Besides, if it be true, as argued for the defendant in error, that no appeal lies to the Supreme Court from the Territorial Court of the Indian Territory, then the act regulating appeals in case of that Territory cannot be the one referred to in the 35th Section of the Foraker Act, for that refers to some law which does allow appeals.

While it is true as a general thing that the *effect* of the Judiciary Act of 1891, made final in the Court of Appeals judgments in cases that did not involve federal questions, yet that is not the classification contained in the 6th and 15th sections of that act. The burden of the defendant's argument against the jurisdiction of this Court seems to be that this case, and cases like it, ought not to have been made appealable to this Court. But the Court has had occasion heretofore to call attention to the fact that the terms of the 15th and 6th sections of the Judiciary Act of 1891 are so explicit and unambiguous that the Court cannot say because a case arises which, if the attention of Congress had been specially called to it, would, it is believed, have been otherwise disposed of in regard to the Court to which it should be appealed, that that consideration in any way affects the question.

Folsom v. *U. S.*, 160 U. S., 127.

Second.

As to the defense of the transfer of the personal property to Martin Brothers.

Inadvertently the recital of the terms of the 5th condition of the policy on the 25th page of the brief of the plaintiff in error is inaccurate. That recital follows the condition as given in the declaration (Record, p. 3, fol. 5). The exact language of the policy appears in the record, at page 34, folio 54, and it is accurately copied in the brief of plaintiff in error on page 2.

It is true that some courts have held where the condition is that the policy shall cease or be void in case of the sale or conveyance of the property, that this does not cover the case of a transfer by an assured to a firm consisting of himself and a new copartner or copartners, and that such a condition referring to the property insured, will not be broken by a sale or transfer of a part of the property. Such are the cases cited by the defendant in error.

The Washington Fire Ins. Co. et al., vs. *Kelley*, 32 Md., 421.

Scanlon vs. *Union Fire Ins. Co. of Baltimore*, 4 Bissell, 511.

Blackwell vs. *Insurance Company*, 48 Ohio St. Rep., 533.

Cowan vs. *The Iowa State Ins. Co.*, 40 Iowa, 551.

This doctrine proceeds apparently upon the theory that such a clause is in the nature of a forfeiture and should be construed with great strictness, and if the transfer or alienation relied upon is any way different from what can properly be described as a mere sale or conveyance of the whole property to a third party, then, inasmuch as the company could have provided for such partial or modified transfer, it is to be deemed not to have

forbidden it. These cases have not passed, however, without challenge in other courts. In *Malley* vs. *Atlantic Fire and Marine Ins. Co.*, 51 Conn., 251, the Supreme Court of Connecticut says that the case of *Cowan* vs. *The Iowa State Ins. Co.*, 40 Iowa, is against the weight of reason and precedent. The point has never been passed upon in this Court. It is here open as an original question, and it is insisted on the part of the plaintiff in error that this construction is too strict, considering the purpose of the clause and the meritorious character of the defense that arises to an insurance company from the admission of a new partner or partners.

Looking to the reasons for the insertion of the clause, as stated by Mr. Justice Miller in the case cited in the plaintiff's principal brief, there is abundant ground for claiming that the transfer to a partnership of which the insured remains a member falls within the prohibition of this clause—that such a transfer to a firm is a transfer to another person within the meaning of the policy. Such a transaction brings the insurance company into relations with a stranger of whom it has no knowledge and with whom it never agreed to contract, which is the very evil intended to be guarded against, and it seems immaterial whether the original assured retains an interest in the partnership or not; the mischief intended to be guarded against is done. A clause of this character is not properly described as a forfeiture. It is a declaration on the part of the company that its contract is with a particular person, and that is insisted upon with its consequences, one of which is that they do not contract with other people under cover of contracting with him, and this is a perfectly legitimate position for the company to occupy with its customers, the contract being based on personal confidence. The books indeed are full of cases where, to defeat merely technical and unconscionable defenses on the part of insurance companies, the terms of the policy have been con-

strued with great strictness, but the question of construction as to any contract is, What is its reasonable meaning? And applying that rule, it is insisted on the part of the plaintiff in error that the courts have sometimes gone too far in the strictness of the construction of insurance policies from a failure to discriminate between meritorious and unconscionable grounds of defense against the payment of the policy.

But whatever decision this Court might reach upon this question as an original question the cases cited have no bearing, where, by the terms of the condition, not only a sale or conveyance but a change of title or interest is provided for. A transfer to a firm composed of the assured and another or others is held to be within the condition in such a case and to avoid the policy.

And such a provision including a change of title or interest is treated by the Courts as just and reasonable. Thus in *Germania F. Ins. Co.* v. *Home Ins. Co.*, 144 N. Y. 199, the Court says:

"The contract of insurance is peculiarly personal "in its nature, and the success of the business of "underwriting depends largely upon what is known "as the moral hazard.

"It is a well-established principle of the common "law that every man has the right to determine "with whom he will enter into contract obliga-"tions.

"An insurance company is induced to issue or "withhold its policy after carefully scrutinizing "the character of the applicant for insurance.

"It is of the utmost importance to the Company "to ascertain who is to be vested with the title and "possession of the property sought to be insured."

And in *Beggs* v. *Ins. Co.*, 88 No. Car., 141, the Court says of such clause (pp. 143-4):

"Such a stipulation as this, as being both reason-"able and just, has received the sanction of this

"Court in *Sossaman* v. *Pamlico Ins. Co.*, 78 N. C., "145. Indeed, being founded upon the idea of en- "listing the care and watchfulness of the insured "in the protection of the property by keeping un- "impaired his interest therein, it has been uni- "formly regarded as a conservative condition in "policies, which merited the support of the courts."

To the same effect is *Card* v. *Phœnix Ins. Co.*, 4 Mo. App., 424.

Cases in the Supreme Court of Iowa subsequent to the case of *Cowan* v. *State Ins. Co.*, 40 Iowa, 551, which is relied on by the defendant in error, distinguish that case on the ground that there was no provision in the policy in that case relating to a change of title or interest, but a provision merely in respect to a sale or conveyance which was held to mean a technical sale of the whole property.

Hathaway v. *State Ins. Co.*, 64 Ia., 229; s. c., 20 N. W. Rep., 164.

Oldham v. *Ins. Co.*, 90 Ia., 225; s. c., 57 N. W. Rep., 861.

Jones v. *Phœnix Ins. Co.*, 97 Ia., 275; s. c., 66 N. W. Rep., 169.

Germania Fire Ins. Co. v. *Home Ins. Co.*, 4 Misc. (N. Y.), 443, 445.

See also

May on Ins. (4th Ed.), § 279.

3 Joyce on Ins., §§ 2293–5, and note reviewing cases.

1 Biddle on Ins., § 224.

Elliott on Ins., § 273.

Fairly interpreted, the policy in suit does provide that a change of title or interest shall avoid the policy. The language is: "This policy ceases to be in force as to any property which shall pass from the insured to any other person otherwise than by due operation of law, unless," &c. The forms of the condition contained in the policies hereinbefore referred to have been the usual forms of American

policies. This fifth condition is the usual condition in English policies (Porter on Insurance, 2d Ed., p. 180). No English case has been found interpreting this condition. The Scotch case in which a condition almost identical with this was passed upon by a Scotch court, referred to by the defendant in error, does not aid in the decision of the question. In that case the policy insured the firm; the property described in the policy stood in the name of one of the partners for the benefit of the firm. A subsequent arrangement was made which, if it had been carried out, would have altered the relative interests of the partners in the property. It would not have introduced any stranger into the firm. If consummated the interest of one of the partners would have ceased. The Court found that the arrangement had not been consummated, and the relative interests of the parties were not changed at the time of the loss, but expressed an opinion that if it had been consummated the policy would not have been avoided. This is quite consistent with the cases in this country, which hold that a change in the relative amount of the interest among the assured, or the termination of the interest of one or more of the assured, does not amount to such a change of title or interest as is forbidden by such a clause.

The clause in question in the present case covers the case not only of a sale of the property to a stranger, but "the passing of any property in- "sured from the insured to any other person other- "wise than by due operation of law." What passes by due operation of law is not the property itself physically, like the passing of property sold from the vendor to the vendee by delivery, but a title or an interest, and the language, "any property hereby insured" is broad enough to cover any part of the property insured, whether it be a part divided in specie or an undivided interest. The condition is to be read as if the words were: "This policy ceases to be in force as to

any property hereby insured, an interest or title in which shall pass from the insured to any other person otherwise than by due operation of law, unless," &c. Cases, therefore, under American policies which forbid a sale or transfer of the property itself, are not in point in the interpretation of this clause. The clause was evidently designed for the purpose of protecting the company against interest to be acquired by any other person than the insured in the property.

Moreover, the peculiar facts in this case are such as to distinguish it from all the cases cited. In the ordinary case of a transfer by the assured to the firm the assured continues to be an active member of the firm. It may at least be said that the company has to some extent that care and supervision over the property on the part of the insured on which it relied as a matter of personal confidence in consenting to the contract. Although his copartners may have the like power he has power to protect the property against dangers which threaten it; but in the present case for all practical purposes this property was as if it were sold and conveyed to strangers. At the time of the insurance Francisco Martin the insured was carrying on the business and had his store and stock of goods at Coto, but before the loss he had retired from business and had become what is called a silent partner, and by the testimony of the plaintiff himself he, the plaintiff, a new party and a stranger, managed the business. The fact that the assured, Francisco Martin, retained an interest of $10,000 in the business means only that he left his money there or that the firm owed him that amount. As he was no longer an active partner he did not and could not exercise the control and supervision over the property which the company had stipulated for. Therefore, whatever may be said with regard to the propriety of decisions in other cases, upon the particular facts of this case this was a passing within the meaning of this condition of the property to other persons even to

the extent of giving them the possession. The transaction passed over the possession and the actual control of the property, and no authority is cited where, upon such a state of facts, any court has held that it was not a transfer to another person within the meaning of such a clause in the policy. The transfer was one fully within the meaning of the policy and effected the very mischief intended to be guarded against.

The suggestion in the brief of the defendant in error that it was incumbent on the plaintiff in error to produce a Spanish authority as to the construction in this regard of this policy, has no merit. From the fact that neither party produces such an authority the Court may infer that there are no such authorities, and if there are no such authorities—in other words, if there is no special law of Spain or of Porto Rico on that subject, then the Court must give to the written instrument such construction as it shall deem to be just and reasonable and in accordance with the intent of the parties.

Third.

The construction put upon the third condition of the policy by the defendant in error, that the clause thereof allowing proof to be made to the satisfaction of the directors, that the loss or damage was not in fact caused by the invasion or riot is in the nature of a provision requiring preliminary proofs of invasion, riot, &c., as a condition of maintaining a claim under the policy, is not tenable.

There was indeed a special condition requiring notice of the fire and a particular account of the damage (Clause 6; Record, p. 34), which requirement would be waived on the authorities if the failure to pay was put upon an independent ground.

This clause attached to the provision about loss or damage by invasion simply makes it incumbent upon the insured if the loss happened during invasion or riot to prove that the fire arose from an independent cause. The substantial ground of defense is that the loss or damage happened during an invasion or riot. If no proof is made of any other cause, then this condition is in full force and operation. This case may be searched from beginning to end without disclosing any evidence whatever that the fire arose from any other cause than that attributable to the invasion or to riot. The proof of invasion was furnished by the plaintiff himself, as pointed out in the principal brief. It is idle to say that there could be a hostile army at Ponce with no invasion at Coto, within $3\frac{1}{10}$ miles. In fact, the plaintiff admitted existence of the invasion at Coto by requesting of the commanding general a detachment of troops to guard his place at Coto on the first coming of the invaders at Ponce. The reason for inserting such a clause as this in a policy is obvious. The presence of an invading army necessarily displaces the authority or the control of the existing government in the country or locality where the invading army is. The moral and legal forces which keep in check lawlessness within the territory are for the time being paralyzed, except so far as the invading force itself exerts the same influence. The old maxim, "*Silent leges inter arma*" expresses a profound truth. The presence of a foreign army for the time being suspends the operation and the influence for peace and order of the existing system of laws. This is so plain that even if there had been no special clause in the policy by the Spanish law in force in Porto Rico the underwriter would be released from the condition of his contract if the fire was caused by military forces or by mobs (Code of Commerce, p. 32 of our former brief). This tends to show the reasonableness of such a provision, and the provision in this policy went further than the Spanish law, but there is

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nothing in the Spanish law forbidding the provision here inserted that loss by fire during invasion shall not be deemed covered by the policy unless proof is made that it arose from an independent cause. There being then no proof whatever of any independent cause, upon the evidence the plaintiff in error was entitled to ask the Court, as it did, to charge the jury that if they were satisfied of the existence of the invasion or riot at the time of the fire the plaintiff could not recover. Nor is there anything in the record which shows that the Court did not understand this request. The Court insisted upon charging the jury only, that if the fire arose by reason of invasion or riot, then the plaintiff could not recover. The Court virtually ruled that this was the proper construction of the policy. The assumption of the defendant in error that the attention of the Court was not called to this precise point is unfounded. It is true that the bill of exceptions is not artificially drawn. Apparently the stenographer's minutes are just as they were printed, giving the colloquy between the Judge and the counsel, whereas the minutes should have been extended so as to present in a more intelligible way the rulings excepted to, &c. But this is mere matter of form; the substance is there. The Court is distinctly asked to charge a proposition which upon the proofs made, the plaintiff in error was entitled to have the Court charge, and there was a refusal. It is evident that Mr. Dexter did all that could be expected of a reasonable man to make the Court understand what his points were, and they are fairly stated and intelligible on the Record.

As to the point of an invasion, throughout the trial the Judge was insisting that the testimony should be narrowed down to the very place where the goods were situated. This the defendant's counsel contested, but so far as the introduction or rejection of testimony was concerned he seems to have failed to take exceptions. But the fact is admitted that the invading army was at Ponce, about

three miles away, connected with Coto by the military road, and that soldiers were detailed at the request of the plaintiff to protect his property. In the nature of the case, invasion is not and cannot be limited to the ground the soldiers tread upon. Its influence, which this clause in the policy was intended to guard against, extends to the surrounding country. Coto was easily within range of modern rifles and modern artillery, and it would be absurd to attempt to distinguish between Ponce and Coto in respect to the condition of an existing invasion.

As to the proof of riot at Coto on the night of the fire the evidence was also very strong, and there was no evidence offered of any other cause of the fire.

The instruction asked for was therefore proper and should have been given.

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Of Counsel for Plaintiff in Error.